1996

Christina R. Stokes v. Mary J. Pulley, Wendell Hansen, Camille Fowler, Jim Hansen and Regan Hansen : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CHRISTINA R. STOKES,

Plaintiff-Appellant,

vs.

MARY J. PULLEY, WENDELL HANSEN, CAMILLE FOWLER, JIM HANSEN and REGAN HANSEN,

Defendants-Appellees.

Case No. 960280 960692 CA
(960400337)

Oral Argument
Priority 15

BRIEF OF APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE RAY M. HARDING, SR.

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ATTORNEYS FOR APPELLEES

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Plaintiff-Appellant,	:	Case No. 960280 (960400337)
vs.	:	Oral Argument Priority 15
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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1997), as the appeal was poured over from the Supreme Court by order dated October 29, 1996.

ISSUES PRESENTED

1. Whether a close family relationship between the property owners in a boundary by acquiescence case creates a presumption of, or carries greater weight as to, nonacquiescence in the artificial boundary?

This issue was implicitly raised at trial (R. 550-551).

This is a question of law reviewed nondeferentially for correctness. Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1996); State v. Pena, 869 P.2d 932, 936 (Utah 1994); Carter v. Hanrath, 885 P.2d 801, 803 (Utah App. 1994), rev'd on other grounds, 925 P.2d 960 (Utah 1996).

2. Whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the artificial boundary?

This issue was also raised implicitly at trial (R. 550-551) and more generally in plaintiff-appellant's Reply Memorandum in Support of Motion for Summary Judgment (R. 102-101).

If the previous question is answered in the negative, this question is one of fact. "A trial court's findings of fact are reviewed under a clearly erroneous standard." Gillmor v. Cummings, 904 P.2d 703, 706 (Utah App. 1995); Clair W. and Gladys Judd v. Hutchings, 797 P.2d 1088, 1090 (Utah 1990); Carter v. Hanrath, 885 P.2d 801, 803 (Utah App. 1994), rev'd on other grounds, 925 P.2d 960 (Utah 1996); Utah R. Civ. P. 52(a).

If the previous question is answered in the affirmative, this question is a mixed one of law and fact and is reviewed under an abuse of discretion standard. State v. Pena, 869 P.2d 932, 936-939 (Utah 1994). A trial court abuses its discretion if there is "no reasonable basis for the decision." Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

3. Whether the district court improperly found that the two properties were adjoining, and improperly concluded that boundary by acquiescence had been established, where the two properties are not adjoining according to legal description?

This issue was raised in plaintiff-appellant's Memorandum in Support of Motion for Summary Judgment (R. 76), Reply Memorandum in

Support of Motion for Summary Judgment (R. 101-100), Trial Brief (R. 123), Response to Defendant's Motion for Summary Judgment (R. 267-266), and at trial (R. 553-555).

This question is a mixed one of law and fact and is reviewed under an abuse of discretion standard. State v. Pena, 869 P.2d 932, 936-939 (Utah 1994). A trial court abuses its discretion if there "no reasonable basis for the decision." Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

DETERMINATIVE PROVISIONS

There are no constitutional provisions, statutes or rules whose interpretation is determinative of or of central importance to this appeal.

STATEMENT OF THE CASE

A. Nature Of The Case, Course of Proceedings, and Disposition Below. Plaintiff-appellant filed this action for quiet title and trespass to real property on June 21, 1994 (R. 3-1). Defendants-appellees answered the complaint and counter-claimed on August 11, 1994 (R. 23-16). Plaintiff-appellant then filed a motion for summary judgment on March 14, 1994 (R. 51-50), which the district court eventually denied on May 5, 1994 (R. 120). Defendants-appellees subsequently filed a motion for summary judgment on November 9, 1995 (R. 176-175), which the district court eventually denied on January 2, 1996 (R. 276-275).

The district court held a bench trial on March 21, 1996 (R. 323-565), and entered an Order of Judgment (R. 316-312) and Findings of Fact and Conclusions of Law (R. 311-303) on May 21, 1996. The district court found that defendant-appellant Mary J. Pulley had established boundary by acquiescence and ordered that her deed be reformed to include the disputed property. The district court also found that defendants-appellants had not trespassed on the property of plaintiff-appellant. This appeal followed (R. 318-317).

C. Statement Of Facts. Plaintiff-appellant, Christina R. Stokes ("Stokes"), owns a parcel of property in American Fork, Utah, more particularly described as:

> Beginning 16.50 chains North of the Southwest corner of the Northwest quarter of Section 18, Township 5 South, Range 2 East of the Salt Lake Base and Meridian; thence North 2.50 chains East 4.00 chains; thence South 2.50 chains; thence West 4.00 chains to the place of beginning. Area 1.0 acres.

(R. 310) ("Stokes property"). The Stokes property is identified on the county plat map (Trial Exhibit 1) and diagram of property (Trial Exhibit 2) included in the appendix to this brief. Defendant-appellee, Mary J. Pulley ("Pulley"), owns a parcel of property north of the Stokes property ("Pulley property") consisting of approximately 4 acres and also identified on the map and diagram included in the appendix to this brief.

Both properties were once part of a larger parcel of property owned by Andrew Pulley (R. 311-310). In 1934, Andrew Pulley deeded

the Stokes property to his son, Adolphus Pulley (R. 310). In 1946 he deeded the remainder of his property to his daughter, Pulley (R. 241). The property deeded to Pulley at that time is more particularly described as:

> Beginning at the center of Section 18, Township 5 South, Range 2 East, Salt Lake Base and Meridian; thence West 27.15 chains; thence North 33 1′ East 12.58 chains; thence South 85 56′ West 6.18 chains; thence North 4.58 chains; thence West 3.28 chains; thence North 2.50 chains; thence West 4.00 chains; thence North 7.00 chains; thence East 25.00 chains; thence South 6.50 chains; thence East 15.00 chains; thence South 20.00 chains to place of beginning. Area 75.85 acres more or less.

(R. 310-309). Pulley transferred away most of the property deeded to her, but continues to own the four acres north of the Stokes property (R. 240). According to the legal descriptions, the two properties are separated by a strip of land owned by neither party ("description gap").

Adolphus Pulley, and after his death, his wife, Thelma Pulley, owned the Stokes property until 1967 (R. 240). Sometime in the 1940's, while both properties were owned by members of the Pulley family, trees and bushes were planted, and a fence erected, within the Stokes property, approximately 43 feet south of its northern boundary (R. 308). The area between the fence/tree line and the northern boundary of the Stokes property is the disputed property in this case ("disputed property").

In 1967, Thelma Pulley deeded the Stokes property to Lewis and Carolyn Madsen (R. 240), who, in 1973, deeded the property to

Charles and Xenna Boyer (R. 240), who, in 1979, deeded the property to Stokes (R. 240). When she purchased her property, or sometime thereafter, Stokes learned that her property extended beyond the fence/tree line to include the disputed property (R. 308). Both Stokes and defendants-appellees now claim ownership of the disputed property (R. 17).

SUMMARY OF ARGUMENT

The finding of the district court that Pulley and Stokes' predecessors had mutually acquiesced in the artificial boundary for more than twenty years should be set aside. This is because the family relationship between the property owners between 1946 and 1967 should have lead to the conclusion that any occupation of the disputed property to the fence/tree line by Pulley was permissive and not in disregard of the actual boundary line. Furthermore, the evidence in support of the finding, consisting of testimony that the fence/tree line had always served as the actual boundary, was clearly outweighed by evidence that the property owners in fact never treated the fence/tree line as a boundary.

The finding and conclusion of the district court that the two properties have been and are adjoining should also be set aside. This is because the properties are in fact separated, not adjoining. The law requiring that they be adjoining is clear and must be applied strictly, and there is no precedent for expanding that requirement. Thus it was an abuse of discretion for the court

to conclude, based on the facts in this case, that the requirement had been satisfied.

Therefore, the judgment of the district court should be reversed since the above requirements for boundary by acquiescence have not been met.

ARGUMENT

POINT I

A CLOSE FAMILY RELATIONSHIP BETWEEN ADJOINING PROPERTY OWNERS SHOULD CREATE A PRESUMPTION OF, OR CARRY GREATER WEIGHT AS TO, NONACQUIESCENCE IN THE ARTIFICIAL BOUNDARY

To establish boundary by acquiescence, "the party claiming title by acquiescence must establish all of the required elements to give rise to a presumption of ownership in his or her favor." Englert v. Zane, 848 P.2d 165, 168-169 (Utah App. 1993). The elements are (i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a period of at least 20 years, (iv) by adjoining landowners. Jacobs v. Hafen, 917 P.2d 1078, 1081 (Utah 1996). This doctrine has always been strictly applied in Utah. Englert, 848 P.2d at 168; Staker v. Ainsworth, 785 P.2d 417, 423 (Utah 1990).

Therefore, in order to establish boundary by acquiescence, the owners of the properties must have mutually acquiesced in the artificial boundary line for a period of twenty years. Jacobs, 917 P.2d at 1081 (Utah 1996). That is, during the requisite period of time, the property owners must have treated the artificial boundary

as the actual boundary. Where "neither party treated the fence as the actual boundary, there could be no knowledge of or acquiescence to the line as a boundary line." Carter v. Hanrath, 885 P.2d 801, 805 (Utah App. 1994), rev'd on other grounds, 925 P.2d 260 (Utah 1996). Nothing prevents a party from "claim[ing] to the true boundary, . . . where it is clear that the line as located was not intended as a boundary. " Brown v. Milliner, 232 P.2d 202, 207 (Utah 1951).

When the owners on either side of disputed property are not related, their activities such as caring for, or repairing the property up to, the artificial boundary line, may naturally lead to the conclusion that both acknowledge it as the actual boundary. However, when the property owners are closely related, such as parent and child, or brother and sister, such activities are likely to be for the benefit of the other and should not imply acquiescence in the artificial boundary.

The mutual acquiescence requirement for establishing boundary by acquiescence is similar to the adverse use requirement for establishing common law adverse possession or prescriptive easement. Homer v. Smith, 866 P.2d 622, 626 (Utah App. 1993) (identifying elements of prescriptive easement). All three doctrines are based on the notion that a property owner must resolve disputes regarding ownership within a reasonable time or relinquish her right to the disputed property. The doctrines also recognize that there can be no relinquishment until there has been

some dispute needing to be resolved or misunderstanding needing to be corrected. Thus, there can be no adverse possession or prescriptive easement when the occupation by the other party has been permissive. Similarly, there can be no boundary by acquiescence when the occupation by the other party up to the artificial boundary is permissive and it is not recognized or treated as the actual boundary.

It is generally recognized in adverse possession and prescriptive easement cases that a family relationship between the parties creates a presumption of permissive use, or rebuts a presumption of adverse use, shifting the burden to the other party to prove clear, definite, and unequivocal notice of adverse use. 2 Am. Jur. 2d Adverse Possession § 202-203 (1986); see also Smith v. Smith, 511 P.2d 294, 300 (Id. 1973) (occupation was not hostile since parties were brothers and sister); Watson v. Chilton, 187 S.E.2d 482, 484 (N.C. App. 1972); Tallent v. Barrett, 598 S.W.2d 602, 606 (Mo. App. 1980) (stronger evidence of adverse possession required in the presence of a family relationship); Fehl v. Horst, 474 P.2d 525, 527 (Or. 1970) (close family relationship requires greater showing that possession was hostile or adverse); Metze v. Meetze, 97 S.E.2d 514, 515 (S.C. 1957) (family relationship between father and son-in-law rebuts presumption that encroaching hedges was hostile to father); McIntosh v. Chincoteague Volunteer Fire Co., 260 S.E.2d 457, 460 (Va. 1979) (adverse possession of child against parent requires clear, definite, or unequivocal notice;

erecting fence, using privy, and picking blackberries is not enough).

This principle appears to be recognized in Utah also. In Godfrey v. Munson, 597 P.2d 885, 886 (Utah 1979), the Utah Supreme Court implied that a family relationship would prevent or rebut a presumption of adverse possession where the parties are members of an immediate family. See also Rippentrop v. Pickering, 387 P.2d 94, 95 (Utah 1963) (prescriptive easement claim dismissed where driveway had been used by adjoining property owners who for many years were members of same family). In other cases, Utah courts have rejected such a presumption, but have recognized the importance of a family relationship in determining permissive use. See, e.g. Homer v. Smith, 866 P.2d 622, 627 (Utah App. 1993).

This principle has not yet been applied to boundary by acquiescence cases in Utah. However, Utah courts have recognized that boundary by acquiescence cannot be established in situations where "there was no room for any implication that the fence line had been erected by adjoining owners pursuant to an agreement between them as to the location of the boundary between them." Brown, 232 P.2d at 207-208 (Utah 1951). For example, mutual acquiescence cannot be found to have occurred during a time "when land on both sides of the fence was owned by the same person." Brown, 232 P.2d at 207 (citing Home Owners' Loan Corporation v. Dudley, 141 P.2d 160 (Utah 1943). Also, boundary by acquiescence

"cannot be established when one of the adjoining tracts of land is part of the public domain." Carter, 925 P.2d at 962 (Utah 1996).

A similar presumption should apply in this case, and Stokes requests this Court to recognize that when the property on either side of an artificial boundary is occupied by members of the same immediate family, such as brother and sister, there is a presumption against mutual acquiescence, which must be rebutted with clear evidence to the contrary. In the alternative, the Court should at least recognize that the family relationship is a factor demanding greater weight in a determination regarding mutual acquiescence.

POINT II

THE DISTRICT COURT IMPROPERLY FOUND THAT PULLEY AND THE PREDECESSOR OF STOKES MUTUALLY ACQUIESCED IN THE ARTIFICIAL BOUNDARY PRIOR TO 1967

In its Findings of Fact and Conclusion of Law, the district court found that for at least 33 years, from 1946 to 1979, Pulley and the owners of the Stokes property prior to Stokes "considered and acquiesced to the fence/tree line as the boundary" between the two properties (R. 309). The evidence regarding the period from 1967 to 1979 was mainly uncontroverted. However, with respect to the period from 1946 to 1967, this finding is clearly erroneous.

The finding is supported by the testimony of John Pulley, Ron Pulley, Julie James, and Wendell Hansen, all relatives of Pulley who lived on the Pulley or Stokes property between 1946 to 1967. They testified that the fence/tree line had always served as the

boundary between the Pulley and Stokes property (R. 469, 475, 488, and 499), that Pulley regularly mowed, watered, and planted flowers on the disputed property (R. 470, 489), and that Andrew Pulley had farmed the disputed property (R. 498).

However, the same witnesses provided substantially more evidence that the fence/tree line was not treated as a boundary between 1946 and 1967. Instead, the property owners gave each other liberal access to each other's property, almost as though there were no division between them.

John Pulley testified that Pulley would also mow and water the property south of the fence/tree line for her brother (R. 471-472). Ron Pulley testified that, while living on the Stokes property, he sometimes mowed the lawn on both sides of the fence/tree line (R. 476), that the row of bushes had to be kept clean so "both of us could mow on both sides (R. 479)." His testimony also suggests that the fence may have been built originally just to keep in animals as opposed to establishing a boundary (R. 479).

Julie James testified that

> [w]hen I was younger we had--we used to play [on the disputed property] all the time. I mean we had rock gardens and frog ponds, I mean that was--all the cousins, that's what we did, we had frog ponds and we go hunt frogs.

(R. 489). She and other members of her family viewed the Pulley home "just like our home. I mean Aunt Mary is our family (R. 490)." According to Julie, the fence had to be repaired oc-

casionally because "us kids would climb over and kind of mash it down a little bit (R. 495)."

Finally, Wendell Hansen testified that when he lived on the Stokes property he went back and forth between the properties "very much" (R. 499) to visit his mother in the Pulley home, and remembered "even jumping the fence in the back and going up to see my mother (R. 499)."

The testimonies of these witnesses clearly established that the fence/tree line was never treated as the actual boundary between the properties. In addition, Stokes testified that she had a conversation with Pulley in May, 1979, in which Stokes stated that she had learned that she owned some property north of the fence/tree line. According to Stokes, Pulley admitted that although she had been taking care of the property, it belonged to Stokes (R. 370), and Pulley requested permission to continue using it for a Christmas pageant (R. 336), suggesting that Pulley never believed the fence/tree line to be the actual boundary. This was uncontroverted and the district court did not specifically find that her credibility was questionable.

Therefore, without the application of any presumption, the finding of the district court that mutual acquiescence occurred between 1946 and 1967 is clearly erroneous. However, as explained above, the family relationship between the property owners at that time should create a presumption of nonacquiescence, rebut any presumption of mutual acquiescence, or should at least be given

greater weight than the fact that Pulley occupied and maintained the disputed property. If such a presumption applies, the finding of the district court is unreasonable and an abuse of discretion. Mutual acquiescence may have occurred at the earliest from 1967 to 1979. This is less than twenty years and is insufficient to establish boundary by acquiescence. Therefore, the judgment of the district court must be reversed.

POINT III

THE DISTRICT COURT IMPROPERLY FOUND THAT THE PROPERTIES WERE ADJOINING

Another requirement for boundary by acquiescence is that the properties must be adjoining. Jacobs v. Hafen, 917 P.2d 1078, 1081 (Utah 1996). This requirement, like the others, must be strictly applied. Staker v. Ainsworth, 785 P.2d 417, 423 (Utah 1990). In this case, the district court has abused its discretion and misapplied the law to the facts.

Black's Law Dictionary defines "adjoining" to mean "touching or contiguous, as distinguished from lying near to or adjacent. To be in contact with; to abut upon." Black's Law Dictionary 712 (6th ed. 1990). It also defines "adjoining owners" as "persons who own land touching the subject land." Id.

According to the legal descriptions, the Stokes and Pulley properties are completely separated by a strip of land owned by neither party. In its Findings of Fact and Conclusions of Law, the district court found and concluded that the Pulley and Stokes property have been and are adjoining lots (R. 307 and 305). This

was based on its other findings that the description gap was unintended by Andrew Pulley, who deeded the property to Pulley, and resulted from a mistake in the description process (R. 307). Although Stokes provided another explanation for the description gap as evidence that it was intentional, the finding of the court that it was unintentional was adequately supported and is not challenged here.

Even if unintentional, the fact remains, however, that the properties are not adjoining according to legal description. The requirement that they be adjoining is clear and should be strictly applied. There are no cases recognizing any exception to the requirement, let alone an exception for a mistake in description. In its memorandum decision, the court cited Affleck v. Morgan, 364 P.2d 663 (Utah 1961) in support of its finding, but that case is not on point and does not recognize any such exception. The district court had no discretion to create such an exception and abused its discretion in finding and concluding that the requirement had been satisfied in this circumstance. Therefore, for that reason, the judgment of the district court should be reversed.

CONCLUSION

For the reasons above, Stokes respectfully requests that this Court reverse the decision of the district court and require the district court to quiet title in her.

STATEMENT REGARDING DOCKETING STATEMENT

Stokes acknowledges that she has raised in this brief issues beyond that identified in her docketing statement of August 19, 1996. However, the Utah Supreme Court has recently held that failure to list all issues presented for review in the original docketing statement does not preclude the appellant from raising them in the brief. Nelson by and through Stuckman v. Salt Lake City, 919 P.2d 568, 572 (Utah 1996). This is because the "docketing statement is for the benefit of the Court, not the appellee." Id.

In that case, the appellant had filed an amended docketing statement raising the additional issues. Stokes has not done this because there is currently no rule identifying the format or procedure for filing an amended docketing statement. However, if that is a prerequisite to raising additional issues in her brief, Stokes will follow whatever instructions this Court may give her.

DATED this 2 day of October, 1997.

HELEN H. ANDERSON, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 2 day of October, 1997.

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SECRETARY

J:\HHA\STOKES.BRF

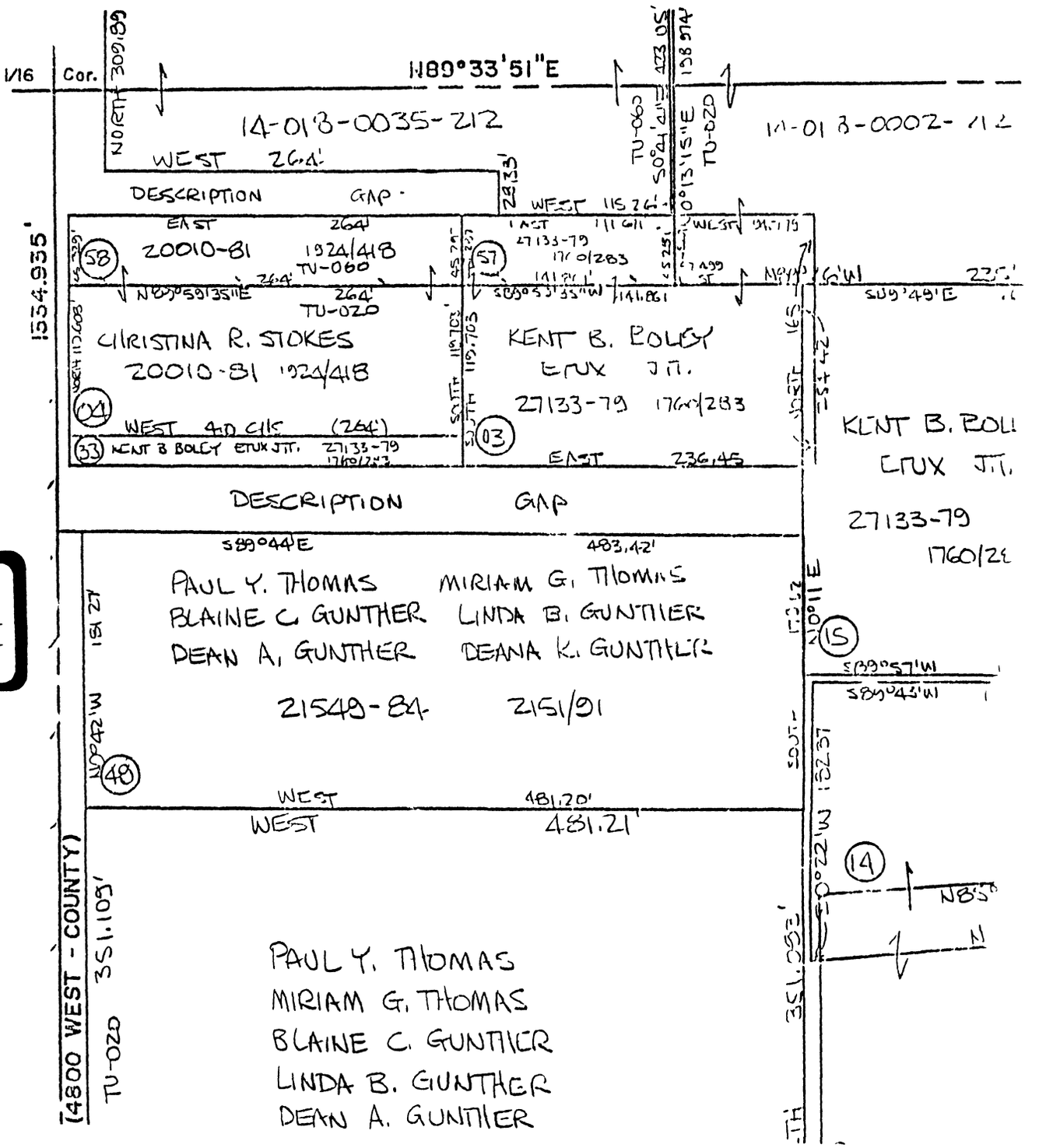
APPENDIX A

County Plat Map (Trial Exhibit 1)

UTAH COUN

SW - NW section 18 township 5 sou

scale 1"

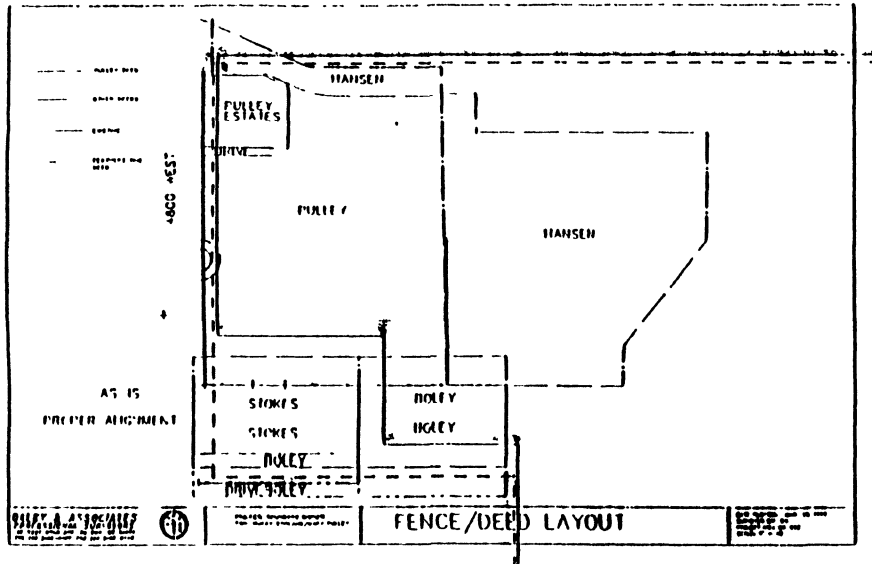


PLAINTIFF'S
EXHIBIT NO.
CASE NO.
DATE. CLK.

12-070

APPENDIX B

Diagram of Property (Trial Exhibit 2)



1887 Deed from Featherstone to Andrew Pulley

1946 Deed from Andrew Pulley to Mary Pulley

7.5 acres approx.